

1 on.

2 And secondly, in regard to the cancellations of  
3 licenses, of fictitious licenses, the way our rules are set  
4 up, if you gradually over time accumulate so many customers  
5 on your conventional system so that you achieve the maximum  
6 loading, you can then convert that to a trunk system which  
7 gives you exclusive use of those frequencies.

8 And so there is a motivation, and I'm not saying  
9 it's present in this case, but it's something we want to  
10 look at. There is a motivation to accumulate as many  
11 customers on paper as you can, and then when you make your  
12 conversion start canceling those licenses and convert them  
13 over to your trunk system.

14 So if we had the loading information to find out  
15 if the company that was being canceled was valid in the  
16 first place, it would make our burden much easier.

17 I can't say that it thwarts our determination on  
18 these two issues. But it very effectively blocks it in the  
19 sense that it takes many more hours, many more resources, to  
20 determine it.

21 JUDGE SIPPEL: You're talking about a substantial  
22 investment of time and expense to develop these two issues.

23 MR. HOLLINGSWORTH: Exactly, exactly. Because --

24 JUDGE SIPPEL: Without the benefit of those  
25 records.

1           MR. HOLLINGSWORTH: That's right. It's similar to  
2     telling the IRS, "I made \$10,000. I don't have records as  
3     to whether that's inherited money, interest, dividends,  
4     money from a real estate limited partnership. You have to  
5     figure it out because this is just the way I keep my  
6     records." They can figure it out probably eventually but  
7     the burden it's going to take is incredibly more difficult.

8           JUDGE SIPPEL: All right. Now, I'm aware that  
9     there is language that's been quoted to me and I have read  
10    these notices for proposed rulemakings and what not, where  
11    the Commission has said that -- well, where the Commission  
12    has in effect -- I'm going to use some terminology here in a  
13    general way, but they've deregulated the record-keeping  
14    requirements for people such as Mr. Kay. And they said,  
15    "all right, you don't have to keep a lot of this information  
16    on user information."

17           Let me just finish my statement. You can correct  
18    me or qualify me.

19           In saying that, the Commission still can and will  
20    request end user information from licensees in order to  
21    confirm the end user eligibility.

22           So I mean there is qualifying language in these  
23    regulations that says that -- it doesn't mean that the  
24    licensee can just walk away from the responsibility to turn  
25    information over.

1 But my question -- I'm sorry. Now, I made that  
2 statement. Did you want to qualify that in some way, Mr.  
3 Kellett or Mr. Hollingsworth?

4 MR. HOLLINGSWORTH: I'd like to pick up on it,  
5 and, you know, we are 90 miles away in Gettysburg, so we  
6 have a little more distance from what goes on in the  
7 Commission. But stepping back, as Gary mentioned, it was  
8 two years ago today that we asked for basic elementary  
9 business records. That we put licensees on notice nearly  
10 four years ago that although we were deregulating and making  
11 life easier for them, we would still need those basic items.  
12 And that was after notice and comment to the whole industry,  
13 I might add.

14 And the basic information that we said we would  
15 still need was standard business records that licensees  
16 should already be keeping in the ordinary course of  
17 business. And that's 7 FCC Record No. 18, the 1992  
18 documents. And that's loading figures taken from the  
19 ordinary business records. That's right out of the order.

20 And it's also important to point out that in our  
21 opinion these are records that he couldn't charge a fee for  
22 radio service without. And our contention is he couldn't  
23 even set up a radio system without it. It would be similar,  
24 in my mind, to asking the phone company for a list of names  
25 and numbers. And so they send you all the pages of the

1 phone book, but on every page they have from one to maybe 12  
2 phone numbers.

3 And to believe that they operate their business  
4 that way requires you to believe that if I called Joe Smith,  
5 175 people answer, and I say, "All you people who aren't Joe  
6 Smith, would you hang up please?" Everybody knows you can't  
7 run a phone company that way. And we know from our  
8 experience of dealing with hundreds of thousands of these  
9 end user licensees that you can't run a land mobile business  
10 that way.

11 We warned him three times that we had to have  
12 this. It was right out of the order. We extended the time  
13 he said he needed to get up the information. And we  
14 modified our request more to his convenience to give it to  
15 us. We went as far as we possibly could. And his response  
16 was, "No time is convenient." He said that he trusted that  
17 terminated our inquiry.

18 And I might add, that was our public interest  
19 determination, our statutory requirement to make an inquiry.

20 So here we are today, two years later, without  
21 records to determine if he's amassed more frequencies and  
22 more systems than our rules and fair competition would allow  
23 him to do so.

24 And I'm sorry to be reading some of this, but I  
25 want to make sure that --

1 JUDGE SIPPEL: Where are you reading it from?

2 MR. HOLLINGSWORTH: From my own notes here.

3 JUDGE SIPPEL: Oh.

4 MR. HOLLINGSWORTH: I want to make sure that it  
5 gets into the record. It is the classic IRS analogy. Send  
6 them tens of thousands of documents, cosmetically organize  
7 them, let them figure it out. This is just the way we do  
8 it. Let them figure it out.

9 And also finally, and I won't burden the record,  
10 but we merely asked him for the basis of certifications, and  
11 Mr. Fishel can explain this if we need it more. We're  
12 merely asking for the evidence or the basis of  
13 certifications that he had to make to us all along, every  
14 time he asked for an additional frequency and got it. Or an  
15 additional system within a certain market area. He made  
16 certifications that such things were the case with their  
17 systems. And now we're asking him for the basis of it and  
18 the record shows what answers we're getting.

19 And in my mind, the trend is to thwart a public  
20 interest inquiry at every turn, and I can't help but keep in  
21 mind that this is the same licensee that wanted the  
22 designation order dismissed because the Bureau had changed  
23 its name.

24 And that's where we are coming from --

25 JUDGE SIPPEL: Be careful now. Let's keep it on

1 an even keel here. They did -- there was some discovery  
2 made, some production of documents made, in conjunction with  
3 the discovery in this case after it went to hearing in  
4 December. Now, that was a year -- almost a year after your  
5 first request was made. I understand that.

6 I mean I'm very much aware of the time lines here.  
7 But the fact remains is they did make production of customer  
8 records and then they did make some productions in  
9 connection with the answer to Interrogatory No. 4 of a  
10 customer -- well, it's information that, as I understand  
11 your concern, it does not relate -- it may be relevant  
12 information, but it doesn't tie in with each of the  
13 channels.

14 Am I basically understanding it?

15 MR. HOLLINGSWORTH: That's right.

16 JUDGE SIPPEL: That's what you're saying.

17 MR. HOLLINGSWORTH: And I think that is our main  
18 point.

19 Getting back to the phone company analogy, you  
20 could say they gave us all the names, they told us where  
21 their telephone company offices were, they gave us this,  
22 they gave us that, but the prime batch of information we  
23 need and must have to determine whether the configuration of  
24 the whole system in Los Angeles, all of his stations is  
25 proper, is what we don't have and that's what we're arguing

1 today.

2 They gave us a lot of information. I'll credit  
3 them for it. But the prime thing that we need, two years  
4 ago we asked for, we're still here without it today. But  
5 what you say is exactly right on the other issues. And I  
6 don't mean to imply that they've done this on every single  
7 interrogatory, or every single point that we've asked for.

8 JUDGE SIPPEL: Well, they did -- I mean the  
9 affidavit suggests that you should go back to the customer  
10 records and you should line up which of this -- I guess I  
11 would generically call it "user information" that they gave  
12 you with respect to Interrogatory 4. That you should do the  
13 match-up. In other words, you had the name in both places.  
14 You just had to match the addresses and all that kind of  
15 stuff from the customer billing with what he gave you in  
16 response to the interrogatory.

17 MR. HOLLINGSWORTH: But to do that requires us to  
18 talk to the end users. And here's a sample list with  
19 probably 15 or 20 customers, and four call signs.

20 The way he claims his system is set up when we  
21 contact the end users, they don't know which call sign  
22 they're on. This is information that he -- they just know  
23 they're on one of these four call signs.

24 JUDGE SIPPEL: Well, they're being charged a fee,  
25 isn't that correct, on a regular basis?

1           MR. HOLLINGSWORTH: Exactly. And I dare say that  
2 if those fees aren't paid, he has some system of knowing  
3 that and collecting them. So somewhere in these companies,  
4 somebody knows how these systems are allocated. The end  
5 users do not know.

6           JUDGE SIPPEL: Well, let me go back to your  
7 telephone and let me follow you with that a little bit.

8           If I get a bill from the telephone company, which  
9 I do, and I pay the bill, I either write down on the check  
10 what my telephone number is, or my telephone number is  
11 printed on my check.

12          MR. HOLLINGSWORTH: Uh-huh.

13          JUDGE SIPPEL: It seems to me that if I were  
14 paying somebody to use a station, I would want to be able to  
15 do the same thing.

16          MR. HOLLINGSWORTH: Well, the customers don't.  
17 All they want to know is that they are being fairly billed.  
18 If they have 12 plumbing trucks out there, if they are being  
19 billed for 12 mobiles. Because they charge so much money  
20 per mobile per month. So all they care about is looking at  
21 the bill and knowing that that bill is fair for 12 mobiles  
22 and they're not being charged for 35. They don't  
23 necessarily know, or they don't know in this case, they  
24 don't necessarily care which system they are operating on as  
25 long as they are not being billed for -- it's like if you



1 look at your cellular bill. You want to generally recognize  
2 the numbers. In this case, a plumber would generally  
3 recognize he has 12 trucks. And you want to know that  
4 you're not charged with three hours' air time when you know  
5 you've never made a cellular call more than a couple of  
6 minutes.

7 That's all they look at. That's all they can know  
8 in this case.

9 JUDGE SIPPEL: All right. So from their business  
10 end of it, they don't care.

11 MR. HOLLINGSWORTH: Right. But Mr. Kay has to  
12 know because he can't -- take J&B Plumbing. He has to put  
13 him on a specific station or repeater site or a few definite  
14 repeater sites. And so to do that, he has to program the  
15 equipment that he sells them. He has to electronically  
16 programming -- it's called -- I think they call it "Burning  
17 the chip" or something.

18 Anyway, all the units of J&B Plumbing have to know  
19 which bay station they're going to access, otherwise there  
20 would be total chaos. It would be like assigning phone  
21 numbers, six phone numbers, among 175 people at random. It  
22 wouldn't work, couldn't work. So he has to program the  
23 equipment, because the equipment electronically identifies  
24 itself.

25 JUDGE SIPPEL: So you are saying -- maybe Mr.

1 Fishel could even focus on this even better, but you are  
2 saying that based on the nature of the business that he's  
3 in, he has to have this information.

4 MR. HOLLINGSWORTH: I would let --

5 JUDGE SIPPEL: And he has to have it readily  
6 available.

7 MR. HOLLINGSWORTH: Right. I think Terry can do  
8 it a lot more eloquently than I can. If I can defer to him.

9 JUDGE SIPPEL: Right. Would you tell us, Mr.  
10 Fishel -- tell me --

11 MR. FISHEL: I'll try.

12 JUDGE SIPPEL: Let's look at it from the  
13 standpoint of what a practical business person like Mr. Kay  
14 is going to want -- to need to have at the end of the month  
15 with respect to the use of all of his frequencies or  
16 channels, as they say.

17 Go ahead, sir.

18 MR. FISHEL: Okay. I think what Mr. Kay is  
19 saying, or at least what's inferred by the information he's  
20 provided, is that he charges per location, even though he  
21 may have multiple stations at each of those locations.

22 I have not seen any time with the years that I've  
23 had that people charge per location rather than on a station  
24 basis.

25 And as Mr. Hollingsworth had indicated, in

1 order -- I'll draw an analogy for a cellular system. You  
2 have a home station. When you are outside that home area,  
3 your system is considered to be roaming and you get a  
4 roaming charge.

5 Mr. Kay has 150, 160 stations. They are not all  
6 at the same location. They all -- not all, but some of  
7 those stations use the same channels. In order for a mobile  
8 unit not to bring up all of those stations on the same  
9 channels simultaneously, those mobiles have to have a means  
10 of talking to the nearest bay station and the bay stations  
11 of recognizing who those mobiles are.

12 And so what Mr. Hollingsworth said is true. Those  
13 mobiles, in advance of operating on any of those systems,  
14 and especially for billing purposes, have to be identified,  
15 have to be programmed, so that they can only operate off of  
16 a couple of those stations on any particular channels.

17 So it's inconceivable to just buy a unit off the  
18 shelf and say, "Go on out and operate, and you'll be  
19 operating in this particular area, so you'll be using one or  
20 two or three or four of my systems there, so I'll bill you  
21 so much a month for -- it doesn't matter how many I have  
22 there."

23 That's virtually impossible to believe. And at  
24 the same time it's quite possible that that operation might  
25 create ongoing mobile communications or communications

1 elsewhere in the area.

2 As Mr. Hollingsworth said, although these records  
3 are not absolutely critical, they do frustrate the Bureau  
4 being able to prove some of the other statements in the  
5 order, contentions in the order, one being interference.  
6 It's quite possible that if those units were not programmed  
7 to operate off specific transmitter sites and they brought  
8 up other transmitter sites in the same frequencies, that  
9 they would interfere with other systems and other users on  
10 those channels.

11 So it's indirectly related, and there are other  
12 issues that the Bureau can use for purposes of proving  
13 interference, but nevertheless, there is that relationship.

14 MR. HOLLINGSWORTH: Not to burden the record, but  
15 I'll give you one example, going back to J&B Plumbing.

16 Without this information, and looking at the bill,  
17 on lots of the bills, maybe most of the bills, I don't know,  
18 there's no call sign. That is, no phone number like you  
19 were indicating. To find out how and where J&B Plumbing is  
20 operating, our field office will have to go to their  
21 headquarters and have them call in every single one of their  
22 mobiles and measure the frequency with a frequency counter.

23 JUDGE SIPPEL: All right.

24 MR. HOLLINGSWORTH: To see which site it goes to.

25 MR. KELLETT: There would also be a call sign

1 identifier there.

2 MR. HOLLINGSWORTH: Right.

3 MR. KELLETT: When they keyed up, the field office  
4 would be able to hear a call sign identifier and tell you  
5 what --

6 MR. HOLLINGSWORTH: He's saying that he doesn't  
7 have that, but he's had to program each and every one of  
8 these customers' radios with that call sign identifier to  
9 avoid mass chaos among all his many systems.

10 JUDGE SIPPEL: Well --

11 MR. FISHEL: The other thing, Your Honor, it might  
12 help to understand that the Commission -- Mr. Kay holds,  
13 let's say, 150 licenses. Each one of those licenses is  
14 authorized operation on certain channels. If Mr. Kay were  
15 actually operating four different stations on different  
16 channels at the same location as a single system, which is  
17 somewhat inferred by his billing practices, the appropriate  
18 thing for him to have done would have been to consolidate  
19 all those channels and reflect that as a single operable  
20 facility, in which case we could buy off on the fact that  
21 those users are using that single facility.

22 But the fact of the matter is what he said is all  
23 the users are using multiple facilities. We don't know if  
24 they are using all of them as a single operable system or  
25 they are just using some of the channels under one of the

1 licenses or two of the licenses, and so forth.

2 JUDGE SIPPEL: Well, what do you suspect is  
3 happening? You feel that you are getting half a loaf at  
4 best. What do the other -- would these records that he gave  
5 you, would they have to be doctored in some way or is there  
6 another set of records someplace?

7 You are nodding your head, but which is it, or  
8 both?

9 MR. FISHEL: From our perspective and from what  
10 we've seen, they're completely inadequate. They're  
11 incomplete. There is not enough information there to  
12 identify whether the information he's provided in terms of  
13 the customers or the users are using all the systems equally  
14 or just part of -- you know, a few of the stations. We  
15 don't know how many stations each are using.

16 JUDGE SIPPEL: Yes, I understand that, that's  
17 where you come out on this. But my question is can you --  
18 in working with those documents, is there a missing  
19 ingredient? I mean would there be something like would it  
20 be logical if -- well, let me put it this way. Let's  
21 suppose that you had a hypothetical licensee and he wanted  
22 to do this to you. He wanted to give you a lot of  
23 information but he didn't want to tell you about channels.  
24 How would he do that? How would he keep that information  
25 from you? Would he just hit his computer and just pull out

1 the channel on each of the documents?

2 MR. FISHEL: Yes. It's quite possible if you  
3 maintain a database of all your customers, and you want to  
4 know how many are operating in a certain location without  
5 regard to the channels, you simply do a search on location.  
6 It would provide a list, just as has been provided here, and  
7 then as perhaps you will note, if you've seen any of the  
8 information provided, the call signs for those facilities at  
9 that location are not computer generated, they're  
10 handwritten, presumably by Mr. Kay.

11 We don't have any of the search criteria. We  
12 don't know whether or not it was searched by frequency. It  
13 appears to be information based on location only. But it's  
14 without regard to the specific call sign, which is what the  
15 Bureau desires.

16 MR. FRIEDMAN: Your Honor, I've been biting my  
17 tongue all morning and the blood is dripping down my neck.  
18 I'd certainly like a chance to at least respond here.

19 JUDGE SIPPEL: Oh, I'm going to have you do that,  
20 and I know that this is -- but I want to avoid going back  
21 and forth and back and forth on this.

22 MR. FRIEDMAN: Okay, fine.

23 JUDGE SIPPEL: Because then it gets confusing.

24 I'm not sure if you've answered my question.

25 Maybe you can't. I don't know. What I'm trying to say is,

1 is that I've got documents that were furnished to me that  
2 have been furnished to you, and, of course, I'm not looking  
3 at them with the same intensity as you all are. But what  
4 I'm asking myself is what else should there be there? And  
5 you say, okay, they should be -- I mean I know -- and I've  
6 known this coming in here today, that you are looking for  
7 the station identification with respect to all the other  
8 technical information, the billing information that you're  
9 getting, and you are not getting it that way.

10 And my question is how would that -- taking the  
11 logic of everything you're saying, you know, you have to  
12 know what station your users are operating on just as a  
13 business matter.

14 With respect to those records, how did they get in  
15 that shape? I mean how did they get produced that way  
16 without having the next logical step; i.e., the channel or  
17 the station identification with it?

18 Mr. Hollingsworth?

19 MR. HOLLINGSWORTH: Don't know.

20 JUDGE SIPPEL: I'm sorry.

21 MR. KELLETT: Kellett.

22 JUDGE SIPPEL: This is Mr. Kellett, yes, sir.

23 MR. KELLETT: What he gave us, it will say  
24 "Lukins" at the top and a bunch of users. That's a  
25 mountaintop, Mount Lukins, okay. These are stations that



1 operate up on Lukins.

2 We don't know which stations these people operate  
3 on. They operate on some of these four stations.

4 JUDGE SIPPEL: But you see what my question is?

5 MR. KELLETT: Right. What we need here --

6 JUDGE SIPPEL: Someplace he's got --

7 MR. KELLETT: -- a different sheet with one call  
8 sign at the top. Okay. If it said WIK 878, and told us who  
9 is operating on 878, that would do it.

10 MR. HOLLINGSWORTH: And there has to be that  
11 because each one of these customers' equipment has to know  
12 how to electronically access one or more of these sites,  
13 otherwise there's mass chaos.

14 JUDGE SIPPEL: All right. I think -- okay. We're  
15 going to start repeating, and you've explained it to me I  
16 think as best you can.

17 Now, my next question is with respect to the time  
18 frame. I understand that you've asked for this information  
19 after we got into litigation from the period of 1991 up  
20 until -- basically up until the present.

21 And yet what you've received with the documents  
22 was just current information, is that right, for 1995?

23 MR. SCHONMAN: Correct.

24 JUDGE SIPPEL: Am I correct on that?

25 MR. SCHONMAN: Yes, that's correct. The date that

1 they filed their response to your discovery order --

2 JUDGE SIPPEL: And the reason that you --

3 MR. SCHONMAN: October or November.

4 JUDGE SIPPEL: All right. But you haven't gotten  
5 information, even -- the information that you have, which  
6 you feel is inadequate, for the reasons that you stated, you  
7 haven't even gotten the right time frame that you've asked  
8 for, they haven't gone back.

9 MR. SCHONMAN: That's correct. We received  
10 current information. That information was deficient, and we  
11 received no information prior to that period in '95.

12 MR. KELLETT: We have his bills, that certain  
13 customers paid bills during previous periods, you know, for  
14 service, say, from Lukins.

15 MR. HOLLINGSWORTH: We have documents that go back  
16 to '84.

17 JUDGE SIPPEL: All right.

18 MR. HOLLINGSWORTH: So we know there are records  
19 going back that far. But what he's given us pursuant to  
20 what we've asked for is just current records. But we've  
21 seen pieces of paper with 1984 dates on them.

22 JUDGE SIPPEL: Well, as I -- let me be sure -- as  
23 I understand the discovery phase of this case is you were  
24 asking for -- and it's basically Interrogatory 4  
25 information. You wanted information going back to 1991.

1 Not necessarily documents, but you wanted the answer to the  
2 interrogatory going back to 1991.

3 Is that correct?

4 MR. HOLLINGSWORTH: Correct.

5 MR. SCHONMAN: Yes, sir.

6 JUDGE SIPPEL: And that you haven't gotten, either  
7 in the context of an answer to the interrogatory or in the  
8 context of the documents.

9 MR. SCHONMAN: That's correct.

10 JUDGE SIPPEL: Even though you do have documents  
11 that pre-date -- that go back, you say, as far as '84. But  
12 we're talking about documents which are apples, oranges, and  
13 pears, and you try to get them all into one category.

14 MR. HOLLINGSWORTH: That's correct.

15 MR. KELLETT: And Your Honor might note that when  
16 the Commission eliminated the recording requirement for end  
17 users in loading, it said that the acceptable proof of  
18 loading will be your billing records. Most people keep  
19 billing records, which identify call stations.

20 And the Commission also said alternative proof of  
21 loading may be acceptable.

22 JUDGE SIPPEL: What would be an alternative?

23 MR. KELLETT: Well, you know, if you don't have it  
24 on the billing records, you could keep other records.

25 JUDGE SIPPEL: This is all in this 92-444, this --

1 MR. KELLETT: It's cited in the Commission  
2 Designation Order.

3 JUDGE SIPPEL: All right.

4 MR. KELLETT: Paragraph 7. I'm sorry I didn't  
5 bring that document with me.

6 JUDGE SIPPEL: The Designation Order? Oh, I have  
7 it. But I don't need to -- again, I don't want to --

8 MR. KELLETT: 19.658 is also helpful on that  
9 score.

10 MR. FISHEL: One of the alternatives mentioned  
11 were invoices.

12 JUDGE SIPPEL: All right. I see where -- the  
13 citation being to 7 FCC record.

14 MR. FISHEL: Right.

15 JUDGE SIPPEL: The 5558 --

16 MR. KELLETT: 5560.

17 JUDGE SIPPEL: Which is the proposed rulemaking.

18 MR. KELLETT: No, that is Report and Order, Your  
19 Honor.

20 JUDGE SIPPEL: The Report and Order starts at 6344  
21 I thought.

22 MR. KELLETT: There are two Report and Orders in  
23 the same time period.

24 JUDGE SIPPEL: All right. I hear you. I hear  
25 you.

1 MR. KELLETT: In that time period the Commission  
2 dealt with loading and end users twice.

3 JUDGE SIPPEL: Okay.

4 MR. KELLETT: If I've made a mistake on that, I'll  
5 copy you on a letter and copy Mr. Friedman.

6 JUDGE SIPPEL: All right. I'll make a note of  
7 that too. And I'll double check that.

8 But I have another question that I wanted to ask  
9 the Bureau, and that is if you feel that -- and you've  
10 articulated in your papers and now in arguing it this  
11 morning exactly why you feel that a summary decision in your  
12 favor would be favorable.

13 What is to be done -- what did you anticipate  
14 doing, if anything, with respect to forfeiture? Because the  
15 Designation Order said even if his licenses aren't revoked,  
16 we still should take a look at forfeiture.

17 MR. SCHONMAN: Your Honor, we have not considered  
18 the matter of a forfeiture. Up to this point, we have been  
19 requesting summary decision of the 308(b) issue, revocation  
20 of all of Mr. Kay's licenses and termination of this  
21 proceeding. We just haven't considered forfeiture yet, on  
22 top of revocation.

23 JUDGE SIPPEL: All right. I may be back to you on  
24 that because it seems to me -- I'm not so sure whether there  
25 be a discretion to just -- if this case were going to be --

1 hypothetically again, if this case were to be terminated  
2 based on a summary ruling, whether or not you can just not  
3 do anything about forfeiture when the Commission says  
4 whether he stays or goes, take a look at forfeiture.

5 If I'm reading it, that's the way they said it.

6 MR. SCHONMAN: Your Honor, we fully recognize that  
7 revocation is a severe sanction, and that is why to this  
8 point we haven't even considered among ourselves the idea of  
9 a forfeiture on top of revocation.

10 JUDGE SIPPEL: Okay. Well, I want to be sure that  
11 I'm clear and that I'm expressing myself clearly, because  
12 the order says, in paragraph 16, "It is further ordered that  
13 irrespective of whether Kay is determined to be qualified,  
14 or it is determined appropriate to revoke or cancel any or  
15 all of his licenses, it shall be determined pursuant to 503,  
16 whether an order of forfeiture shall be issued."

17 That's the way the order reads.

18 MR. SCHONMAN: We would be delighted to consider  
19 that matter in a brief, to present our recommendations.

20 JUDGE SIPPEL: All right. As I say, I don't want  
21 to get ahead of myself because I'm far from resolving this  
22 issue, but I do want to be sure that we're all on the same  
23 wave length as far as what we're required -- what I feel is  
24 required to be done in this case.

25 Now, that answers my first round of questions from

1 the Bureau's side. And I'm aware of the fact, and I  
2 don't -- but we may come back to the Bureau with respect to  
3 the matters that's in the affidavit, because --

4 And I'm saying this to Mr. Friedman, when I'm  
5 looking at Mr. Friedman here. It's the affidavit of Mr.  
6 Kay. Mr. Kay is saying that "All this problem about  
7 documents should go away based on what I've said in my  
8 affidavit." That's basically what he's telling me, and he's  
9 saying that, you know, "This is going to cause me a lot  
10 of -- is a lot of work and effort involved here and there  
11 was an earthquake and I lost these and I lost that."

12 And where do you come out on this? Where does he  
13 come out on this?

14 MR. FRIEDMAN: Very clearly, Your Honor, Mr. Kay  
15 is telling you that he gleaned the information he presently  
16 has regarding the question that was presented to him in  
17 Interrogatory No. 4. He has answered it with the  
18 information available to him at the present time. That's  
19 all that is required of him. We cite in our memorandum a  
20 ruling of the Commission that says "A party that receives an  
21 interrogatory is only required to respond with information  
22 within his control."

23 Mr. Kay is telling you that the information given  
24 to the Bureau is the information in his possession that is  
25 responsive to the question.

1 JUDGE SIPPEL: Well, that's part of it, but when  
2 you relate that back to the inquiry that was made under 308,  
3 going back to January of 1994, he was certainly on notice  
4 that the Bureau wanted to get information with respect to  
5 loading on a channel-by-channel basis and for some reason or  
6 another they're not getting it.

7 And notwithstanding the fact that in these reports  
8 and orders that the Commission has said that even though you  
9 don't have to keep a lot of records that you previously had  
10 to keep, you've got to have this information.

11 Now, why is this going on like this?

12 MR. FRIEDMAN: Well, there are two parts. One  
13 thing I want to add is there is no rule nor has been any  
14 rule cited by the staff that indicates what kind of  
15 information must be kept in what form, in what order, for  
16 what time period.

17 In the deregulation order, as Mr. Hollingsworth  
18 mentioned, all they said was keep business records.  
19 Business records is a very broad term that's used in the  
20 Federal Rules, and is the records as the party keeps them in  
21 the party's ordinary course of business.

22 Unlike cellular operators, Mr. Kay is not Bell  
23 Atlantic. He's not a 10, 15 or 20 billion dollar business  
24 with a very sophisticated billing system. He is a one-man  
25 show. He keeps his business records as a one-man show does.



1           Getting back to your question -- I'm not avoiding  
2   it -- about the 308(b). The 308(b) request came in. The  
3   308(b) request was answered by Mr. Kay's counsel at the  
4   time. The question was raised in the response as to the  
5   business issues in the providing of information that had a  
6   potential negative impact on Mr. Kay's business. Mr. Kay  
7   was concerned as to that impact.

8           His counsel responded to the Commission in that  
9   regard, and they could not achieve any result that was able  
10  to protect the confidentiality of Mr. Kay's business  
11  information. That is why he responded that way. He did not  
12  ignore the request. He had his attorney respond to the  
13  request.

14          JUDGE SIPPEL: Well, I mean, again, that's a point  
15  that I don't want to get into in terms of the telling of the  
16  contents of that, the letter from his counsel. But I still  
17  don't have the answer to my question.

18          Whatever counsel was in this case at whatever  
19  time, plus Mr. Kay, has known since on or about January  
20  something 1994 that the Bureau was looking for information  
21  on a channel-by-channel basis. And they still don't have  
22  it. And I'm saying is why not?

23          MR. FRIEDMAN: The answer is Mr. Kay, in his  
24  business practice, doesn't keep it on a channel-by-channel  
25  basis. He keeps it on a location basis.